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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 683, Misc.

WILLIAM B. HARTSFIELD,
Petitioner,

v.

HONORABLE BOYD SLOAN, United States District Judge for the Northern District of Georgia,
Respondent.

BRIEF

Of Ben W. Fortson, Jr., Secretary of State of Georgia, in Opposition to Motion for Leave to File Petition for Mandamus.

EUGENE COOK,
Attorney General of Georgia,
FREEMAN LEVERETT,
Assistant Attorney General,
ROBERT H. HALL,
Assistant Attorney General,
B. D. MURPHY,
Attorneys for Respondent, Ben W. Fortson, Jr., Secretary of State, State of Georgia.

EUGENE COOK, Attorney General,
State Judicial Building,
Atlanta 3, Georgia.

FREEMAN LEVERETT, Assistant Attorney General,
State Judicial Building,
Atlanta 3, Georgia.

ROBERT H. HALL, Assistant Attorney General,
State Judicial Building,
Atlanta 3, Georgia.

B. D. MURPHY,
1130 The Citizens and Southern National Bank Building,
Atlanta 3, Georgia.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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BRIEF

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I.

PREFACE.

Ben W. Fortson, Jr., Secretary of State of Georgia, was one of the defendants in the complaint as filed in the district court below, and by reason of Rule 31 (3) of the Revised Rules of this Court, is deemed a "respondent" here, and will accordingly be referred to herein by that designation.

II.

OPINION BELOW.

The opinion and order of the district judge below refusing to convene a three-judge court is not reported, but is found as Appendix A to the petition.

III.

JURISDICTIONAL STATEMENT.

Petitioner relies for jurisdiction on 28 U. S. C. A., § 1651 (a). Respondent contends that jurisdiction is lacking for the reason that the complaint fails to raise a substantial federal question.

IV.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

These are as stated in that part of the Petition denominated "Statutes Involved," and will not be repeated here.

V.

QUESTIONS PRESENTED.

Whether a substantial federal question is presented by the complaint, so as to require a three-judge district court pursuant to 28 U. S. C. A., § 2281, to consider the attack sought to be made on the constitutionality of the Georgia statute governing the method of tabulating votes in state-wide primary elections held by political parties for the nomination of candidates for State office.

Respondent contends that since this Court has on three separate occasions within the last twelve years rejected identical attacks on the same state law, the question is no longer an open one. Respondent further contends that the Civil Rights Act of 1957, 71 Stat. 634, does not change the rule.

VI.

STATEMENT OF THE CASE.

Invoking the "All Writs Act," 28 U. S. C. A., § 1651 (a), petitioner here moves the Court under Rule 30 for leave to file a petition for mandamus seeking to require a judge of the United States District Court for the Northern District of Georgia to convene a special three-judge district court pursuant to 28 U. S. C. A., § 2281, to consider a complaint attacking a state statute governing the method of tabulating votes in primary elections held in Georgia.

The petitioner is a white male voter of Fulton County, seeking an interlocutory and permanent injunction to restrain the operation of a statute of Georgia dealing with primary elections by political parties, as applied to a democratic primary for **State offices** to be held in 1958. No state-wide primary for any federal office will be held. The complaint also seeks a declaration that the statute violates the Fourteenth Amendment.

The State law in question is an Act of 1917 relating to party primary elections, known as the Neill Primary Act. The history and operation of the law are set forth in detail in the opinion of the District Court in **South v. Peters,**[1] involving the same questions as are presented here and brought as a class action by another resident of Fulton County.[2] The statute is not confined in its application to

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[1] (D. C. Ga. 1950) 89 F. Supp. 672.

[2] The gist of the law is that if any political party shall decide to hold a party primary to nominate candidates for State-wide elections the candidate receiving the greatest number of votes in any county shall be deemed to have carried that county and shall be entitled to the "unit" vote of such county in determining the nominee of the party. The "unit" vote is related to the constitutional representation in the lower House of the General Assembly, each County having two unit votes for each such representative. The State of Georgia consists of 159 Counties, and the State Con-

any one political party, and does not require that a primary election be held. If any party chooses to hold a primary election, the provisions of the statute become applicable. To obtain an effective injunction the court must control the action of the party, the executive committee of the party, and the chairman and secretary of the party, and also must control the action of the Secretary of State of Georgia with respect to the general election in November, 1958.

While the primary law was enacted in 1917, and has governed all party primary elections since that time, it substantially adopted party primary rules and practices which had governed party primary elections since the first State-wide party primary was held in the State in 1898. The County Unit System has been followed in party conventions from the earliest days of party politics in the State.

Petitioner does not assert anything personal or peculiar to himself which distinguishes him from other voters of Fulton County, but contends that under the Neill Primary Act due recognition is not given to the population of Fulton County, the most populous county in the State, and that a vote in Fulton County does not have the same value under the County Unit System as a vote in the less populated counties.

By an order of April 1, 1958, the District Judge refused to convene a three-judge court.

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stitution allots representation in the House of Representatives as follows: The eight largest counties each have three representatives, the thirty next largest counties have two each, and the remaining counties have one each (Ga. Constitution 1945, Art. X, Sec. I, Par. II, Code Section 2-7801; Ga. Constitution 1945, Art. III, Sec. III, Par. I, Code § 2-1501). Reapportionment on the basis of population is made after each United States census. The 159 counties have a combined unit vote of 410. To be nominated for Governor a candidate must receive a majority of the county unit votes. Provision is made for a "run-off" election in certain cases, and for the popular vote nominating in case of a tie in "unit" votes.

VII.

THE MOTION FOR LEAVE TO FILE THE PETITION FOR A WRIT OF MANDAMUS SHOULD BE DENIED.

The jurisdiction of this Court to issue writs of mandamus is derived from the "All Writs Act" [28 U. S. C. A., § 1651 (a)], and may be exercised only in aid of its appellate jurisdiction. **Parr v. United States**, 351 U. S. 515, 520. It is "meant to be used only in the exceptional case where there is a clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in **DeBeers Consol. Mines v. United States**, 325 U. S. 212, 217." **Bankers Life & Casualty Co. v. Holland**, 346 U. S. 379, 383.

The Court has by express rule (Rule 30) said that writs authorized by 28 U. S. C. A., § 1651 (a), are not issued as a matter of right, but of sound discretion sparingly exercised. And Rule 31 provides that a petition which seeks the issuance of a writ of mandamus "shall set forth with particularity why the relief sought is not available in any other court."

But whether the motion here seeks an appropriate remedy, or whether the relief sought is available in the Court of Appeals, in view of the amendment to the three-judge statute, need not, we think, be considered. This is so because the complaint below did not present a substantial federal question, and the judge was right in denying the motion for a three-judge court.[3]

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[3] "The lack of substance in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *California Water Service v. Redding*, 304 U. S. 252, 255. And see, to the same effect, *Levering & G. Co. v. Morrin*, 289 U. S. 103, 105; *Ex Parte Poresky*, 290 U. S. 303.

Wilentz v. Sovereign Camp W. O. W., 306 U. S. 573, 582, states the rule:

> "The extraordinary procedure before a court of three judges, designed for a specific class of cases sharply defined by the

It may be that the lack of substance in the asserted federal question would both support the ruling below and defeat the jurisdiction of this Court to entertain the petition for mandamus. This also, however, need not be debated, for the lack of substance in the federal question leaves nothing to be said.

The Unsoundness of the Federal Question Which the Petitioner Asserts So Clearly Results From Previous Decisions of This Court as to Foreclose the Subject.

The Georgia County Unit System has heretofore been attacked in four separate cases. Each time it was upheld by the trial court. Each time this Court has affirmed or dismissed the appeal.

The first was **Turman v. Duckworth** (D. C. Ga. 1946), 68 F. Supp. 745, 329 U. S. 675.

There a three-judge federal court in the Northern District of Georgia upheld the County Unit System as valid and as not violating the federal Constitution.

This Court dismissed the appeal. **Turman v. Duckworth**, 329 U. S. 675.

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statute, cannot properly be extended to cases in which there is no substantial basis for relief by injunction restraining the action of state officers in enforcing or carrying into effect a challenged state statute of general application. Ex parte Collins, 277 U. S. 565; Oklahoma Gas & E. Co. v. Oklahoma Packing Co., 292 U. S. 391. Here the issue is not one of jurisdiction of the district court as a federal court, see Ex parte Poresky, 290 U. S. 30, 31; Healey v. Ratta, 292 U. S. 263, but is whether a final hearing by three judges is prescribed by the section and hence whether this Court has jurisdiction to hear the appeal. Smith v. Wilson, 273 U. S. 388. As the case was not one for which a court of three judges is prescribed by § 266, no appeal lies to this Court and it is without jurisdiction to hear the merits of the appeal."

Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co., 292 U. S. 386, 391, is to the same effect.

In a companion case decided at the same time, the same result was reached. **Cook v. Fortson** (D. C. Ga. 1946), 68 F. Supp. 624, 329 U. S. 675.

In **Cook v. Fortson**, the County Unit System as applied to the party primary in a Congressional District was attacked.[4]

In **South v. Peters** (D. C. Ga. 1950), 89 F. Supp. 672, the same questions were again presented and again a three-judge court, with one judge dissenting, upheld the Georgia County Unit System as not violative of the Fourteenth Amendment or other provisions of the federal Constitution. Every contention made in the present case was made in the South case. The District Court reviewed the history of the County Unit System in Georgia and in its findings of fact concluded that it had been in operation since the adoption of the first State Constitution in 1777.

This Court said:

> "The court below dismissed appellant's petition. We affirm. Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a State's geographical distribution of electoral strength among its political subdivisions."[5]

In **Cox v. Peters**, 208 Ga. 498 (67 S. E. 2d 579), the same questions were presented to the Supreme Court of Georgia. That was a suit for damages, the plaintiff contending

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[4] The Georgia statute relating to the County Unit System does not apply to, but expressly excepts, nominations for Members of Congress. "If the County Unit System be imposed in Congressional primaries it is by party action, not State action." *Cook v. Fortson*, 68 F. Supp. 624, 626.

[5] *MacDougall v. Green*, 335 U. S. 281; *Colegrove v. Green*, 328 U. S. 549, are cited as supporting the ruling.

that he had been damaged by reason of the votes cast at the primary of 1950 being counted under the County Unit System. The Supreme Court of Georgia did not fail to uphold the County Unit System in Cox v. Peters; it simply never got to that question, holding that the primary was not an election within the meaning of the constitutional and statutory provisions which the plaintiff there contended gave him the rights he said had been violated.

In that case, this Court dismissed the appeal, "for the want of a substantial federal question."

Cox v. Peters, 342 U. S. 936.

In both **South v. Peters** (339 U. S. 959) and **Cox v. Peters** (343 U. S. 921), motions for rehearing were denied.[6]

Colegrove v. Green, 328 U. S. 549, is a leading case. It is a classic example of the refusal of federal courts to grant relief in a political dispute.[7]

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[6] It is perhaps worthy of note that in Cox v. Peters the Solicitor-General of the United States and the Special Assistant to the Attorney-General filed a brief for the United States, amicus curiae, in support of the motion for rehearing, and that they said:

> ". . . this Court's dismissal of the appeal leaves undisturbed the erroneous ruling of the Supreme Court of Georgia on the only federal question decided by it, and has the unfortunate and plainly unintended effect of preventing appellant from urging on remand that his federal constitutional claim, *although non-justiciable and non-revicwable in federal courts because political questions are involved,* may nevertheless be entertained and adjudicated in the courts of the State of Georgia." (Emphasis supplied.)

[7] "Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislators that will apportion properly, or to invoke the ample powers of Congress. . . . The Constitution has left the particulars of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."

MacDougall v. Green, 335 U. S. 281, is perhaps more directly in point, because it related to an Illinois statute closely akin to the Georgia County Unit Law.[8]

Colegrove v. Green and MacDougall v. Green have been consistently followed.[9]

Especially pertinent is Illinois ex rel. Sankstone v. Jarecki, 116 F. Supp. 422. There the plaintiff whose nominating petition as a new party candidate had been declared insufficient under the Illinois Election Code, attacked the law as unconstitutional, sought declaratory and injunctive relief, and asked that a three-judge court be convened to pass upon the constitutionality of the Illinois law. The District Judge refused to convene a three-judge court and dismissed the complaint, holding **MacDougall v. Green**, 80 F. Supp. 725, 727, 335 U. S. 281, to be controlling, and that, under that decision, the complaint failed to present a substantial federal question.

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[8] "It is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality. This is not a unique policy. See New York Laws 1896, c. 909, § 57, now N. Y. Elec. Laws, § 137 (4); 113 Laws of Ohio, 349, Gen. Code, § 4785-91 (1929), now Ohio Code Anno. (Cum. Supp. 1947), § 4785-91; Mass. Acts, 1943, C. 334, § 2, now Mass. Anno. Laws, c. 53, § 6 (1945). To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to population. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States. . . ."

[9] *Kidd v. McCanless*, 352 U. S. 920;
Radford v. Gary, 352 U. S. 991;
Anderson v. Jordan, 343 U. S. 912;
Colegrove v. Barrett, 330 U. S. 804;
South v. Peters, 339 U. S. 276.

The complainant, evidently believing that a direct appeal would lie to this Court, did appeal, and the Court, without noticing the procedural point mentioned in the brief for one of the appellees, dismissed the appeal for want of a substantial federal question. **People ex rel. Sankstone v. Jarecki**, 346 U. S. 861.

Also in point is Radford v. Gary (D. C. Okla. 1956), 145 F. Supp. 541. There a voter sought a mandatory injunction to compel legislative reapportionment as required by the Oklahoma Constitution, claiming that he was deprived of the equal protection of the law by the failure to reapportion.

The three-judge court dismissed the action, citing **Colegrove v. Green**, supra, **MacDougall v. Green**, supra, and **South v. Peters**, supra. In that case, the complainant relied heavily upon **Dyer v. Abe**, 138 F. Supp. 220, decided by the federal court in the Territory of Hawaii, but the District Court in Oklahoma pointed out, as had the federal court in Hawaii, that "the Territory of Hawaii does not have the same relation to this Court that the State of Illinois has to a federal court within its boundaries." There was a dissent by District Judge Wallace in **Radford v. Gary**, but even he apparently approved **South v. Peters.**[10]

Radford v. Gary was appealed to this Court, and unanimously affirmed. 352 U. S. 991, decided February 25, 1957.

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[10] Judge Wallace said: "In the *South* case the complaint was against the manner in which the local law chose to distribute its electoral strength, admittedly a fundamental right retained by all States."

VIII.

THE CIVIL RIGHTS ACT OF 1957 DOES NOT CHANGE THE RULE.

The plaintiff here invokes 28 U. S. C. A., § 1343, and 42 U. S. C. A., § 1983, as bringing the action within the jurisdiction of the Court.

Apparently reliance is had upon the addition made to 28 U. S. C. A., § 1343, by the Civil Rights Act of 1957.

That Act added a new paragraph to 28 U. S. C. A., § 1343, as follows:

> "(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

If the amendment to 28 U. S. C. A., § 1343, is not merely technical,[11] but enlarges the jurisdiction of the federal courts, it is only to entertain actions authorized by law to recover damages or secure equitable relief under an Act of Congress providing for the protection of civil rights, including the right to vote.

A short and simple answer to any contention that the Civil Rights Act of 1957 operates to change the rule stated

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[11] The House Committee Report accompanying H. R. 6127 (85th Congress, Report No. 291, p. 11) says of the amendments to 28 U. S. C. A., § 1343: "These amendments are merely technical amendments to the Judicial Code so as to conform it with amendments made to existing law by the preceding section of the bill." See 1957 U. S. Code Congr. & Adm. News, Vol. 2, p. 1976. Actually it is highly doubtful whether Section 121 of the Civil Rights Act, amending § 1343 of Title 28, changes the law, as the section it was designed to implement, a proposal to amend 42 U. S. C. A. § 1985, was stricken from the bill by amendment during the Senate debate. 103 Cong. Rec. 11372-73; id. 10693.

by the District Court in **South v. Peters** and affirmed by this Court is that the Act of 1957 does not undertake to protect the right of the plaintiff to vote in a statewide primary to nominate candidates for State offices; nor does that Act undertake to grant to the plaintiff or to any one else the right to vote in such a primary.[12]

The right of the plaintiff to vote for the nomination of party candidates for State offices does not arise under the Constitution and laws of the United States, but under the laws of the State of Georgia.[13] Consequently, the complaint made here, not that he is being deprived of the right to vote, but that his vote will not be given the weight and credit to which he contends it is entitled, does not present a substantial federal question.

The Civil Rights Act of 1957 does not grant to the plaintiff any right to vote, nor does it authorize the intervention of a federal court of equity to protect his right to vote for State offices, or at any primary to nominate party candidates for State offices.

Since the Civil Rights Act of 1957, even if construed to enlarge the jurisdiction of the federal courts with respect to political controversies, limits such enlargement to actions to recover damages or secure equitable or other relief under any Act of Congress providing for the protec-

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[12] In *South v. Peters* it was alleged that the party would hold a primary for United States Senate, Governor and other State offices. 87 F. Supp. at p. 674. Here it is alleged only that the party is planning to hold a primary to nominate candidates for state-wide offices of the State of Georgia. (Complaint, ¶10, R. 34). There will be no election of United States Senator in Georgia this year.

[13] *Minor v. Happersett*, 21 Wall. 162, 170;
Ex parte Yarbrough, 110 U. S. 651, 664, 665;
McPherson v. Blocker, 146 U. S. 1, 37, 38;
Guinn v. United States, 238 U. S. 347;
Breedlove v. Suttles, 302 U. S. 277.

tion of the right to vote, and since there is no Act of Congress which grants or undertakes to protect the right of the plaintiff to vote in a primary to nominate candidates for State offices, the questions presented here are purely political. Whether or not the complaint otherwise presents a justiciable controversy, equity is without jurisdiction to enforce a purely political right. This is especially true of our federal courts of equity.[14]

CONCLUSION.

The complaint does not assert the violation of any private or individual right of the plaintiff and there is no allegation that he has been or will be deprived of the right to vote. He seeks to assert a public wrong suffered by the voters of Fulton County generally, but the wrong he alleges is a political wrong, one which can only be corrected by the political branch of the government.[15]

As to this respondent, the Secretary of State of the State of Georgia, the complaint seeks to enjoin him from certifying to the several ordinaries of the various counties of Georgia for the official ballot for the general election in November, 1958, the names of candidates for state-wide offices who have been nominated under the county unit system. This clearly does not present a justiciable controversy, but calls for the judgment of the Court upon purely political questions.

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[14] *In re Sawyer*, 124 U. S. 200;
Walton v. House of Representatives, 265 U. S. 490;
Taylor v. Beckham, 178 U. S. 548, 570;
Giles v. Harris, 189 U. S. 475;
Lane v. Wilson, 307 U. S. 268;
Colegrove v. Green, supra;
MacDougall v. Green, supra.

[15] *Georgia v. Stanton*, 6 Wall. 50;
Taylor v. Beckham, 178 U. S. 549;
Cherokee Nation v. Georgia, 5 Pet. 1;
Pacific Tel. & Tel. Co. v. Oregon, 223 U. S. 118;
And see *Rhode Island v. Massachusetts*, 12 Pet. 753.

This respondent respectfully submits that Judge Sloan properly refused to convene a three-judge court and that the motion for leave to file the petition for mandamus should be denied.

Respectfully submitted,

EUGENE COOK,
Attorney General of Georgia,

FREEMAN LEVERETT,
Assistant Attorney General,

ROBERT H. HALL,
Assistant Attorney General,

B. D. MURPHY,

Attorneys for Respondent, Ben W. Fortson, Jr., Secretary of State, State of Georgia.

EUGENE COOK, Attorney General,
State Judicial Building,
Atlanta 3, Georgia.

FREEMAN LEVERETT, Assistant Attorney General,
State Judicial Building,
Atlanta 3, Georgia.

ROBERT H. HALL, Assistant Attorney General,
State Judicial Building,
Atlanta 3, Georgia.

B. D. MURPHY,
1130 The Citizens and Southern National Bank Building,
Atlanta 3, Georgia.